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In The

Supreme Court of the United States

OREGON NATURAL DESERT ASSOCIATION, OREGON NATURAL RESOURCES COUNCIL, OREGON WILDLIFE FEDERATION, PACIFIC RIVERS COUNCIL, PORTLAND AUDUBON SOCIETY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, NATIONAL TROUT UNLIMITED, and THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON,

Petitioners,

v.

MICHAEL P. DOMBECK, in his official capacity as Chief of the United States Forest Service, GRANT COUNTY, ROBERT BURRIL, and EASTERN OREGON PUBLIC LANDS COALITION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Ninth Circuit correct in ruling that grazing permits in national forests are not subject to the certification requirements of § 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, because the term "discharge" as used in that section does not include releases from nonpoint sources?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

There is no parent or publicly held company owning 10% or more of the stock of Respondent-Intervenor Eastern Oregon Public Land Coalition ("EOPLC").

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STATEMENT OF THE CASE

Question Presented – And Why It Does Not Merit This Court's Review

Section 401 of the CWA prohibits the federal government from issuing a permit for "any activity . . . which may result in any *discharge* into navigable waters" unless the applicant for the permit first provides certification from the state that the discharge from the permitted activity "will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title."[1] All of the cited sections regulate point sources of pollution – that is, "discernible, confined and discrete conveyance[s]" such as a pipe, ditch, or machine[2] – and only one references water quality standards affecting nonpoint sources of pollution (such as cattle grazing).[3]

The petition in this matter seeks this Court's review of the Ninth Circuit's ruling that the CWA, when examined as a whole, cannot support the conclusion that the term "discharge" in § 401 includes releases from nonpoint

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[1] 33 U.S.C. § 1341(a) (1986 & West Supp. 1999) (emphasis added).

[2] *Id.* at § 1362(14).

[3] In their statement of the case, Petitioners assert that § 401 requires certification that the discharge at issue "will not violate state water quality standards,"which are the primary means of regulating nonpoint source pollution. (Pet. 2-3) In fact, all of the referenced sections regulate *point sources* and only one, § 1313, references water quality standards, which are used to regulate both point sources and nonpoint sources. Apart from § 1313, none of the referenced sections relate to nonpoint sources, and sections that regulate nonpoint sources otherwise are not referenced in § 401.

sources. As detailed below, there is no cause for this Court to review that ruling because (a) it reflects the settled practice for over 25 years of the federal and state agencies charged with administering § 401, (b) it soundly resolves the question at issue in a manner consistent with the legislative history and structure of the CWA, and (c) it presents no conflict with this Court's opinion in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology* ("*PUD No. 1*").[4]

Mechanisms For Regulating Nonpoint Source Pollution That The Petition Overlooks

The petition gives short shrift to other methods by which the CWA regulates nonpoint source pollution, asserting instead that without the use of the certification procedure contained in § 401, the states are deprived of their most important means of protecting themselves from pollution originating on federal lands. (Pet. 6-7) On the contrary, numerous other methods of addressing nonpoint source pollution exist, many of which were employed in the permit at issue. For example, § 208 of the CWA[5] directs states to draft water treatment plans that include procedures for identifying nonpoint source pollution from various sources, including agriculture, and to establish best management practices ("BMPs")[6] to control

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[4] 511 U.S. 700 (1994).

[5] 33 U.S.C. § 1288 (1986 & West Supp. 1999).

[6] The Environmental Protection Agency ("EPA") defines BMPs as "the methods, measures or practices to prevent or reduce water pollution including, but not limited to structural and nonstructural controls, operation and maintenance

such pollution. Section 319[7] requires states to prepare reports that identify navigable waters that cannot be expected to achieve or maintain water quality standards because of nonpoint source pollution, nonpoint sources responsible for impairing the identified waters, and the existing programs for controlling and abating pollution added from nonpoint sources. Section 319 also requires states to devise management programs to control pollution added from nonpoint sources and improve the quality of such waters and to identify and implement BMPs. Finally, Section 313[8] mandates that federal agencies comply with all state water pollution requirements.

Nonpoint Source Pollution Controls Employed In The Grazing Permit At Issue

These means of regulating nonpoint source pollution were employed in the permit at issue. In July of 1993, the United States Forest Service ("USFS") issued a ten-year grazing permit to Respondent-Intervenor Robert Burril and Diana Burril to graze fifty head of cattle in the Camp Creek allotment of Oregon's Malheur National Forest. (USFS Excerpt of Record ("USFS ER") at 38) The permit lists a particular season of use (June through October), but actual grazing time permitted in a particular allotment or pasture is governed by forage utilization standards in an annual operating plan ("AOP") monitored by USFS personnel. (*Id.* at 38, 116) Accordingly, the permit

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procedures, [and] other requirements." EPA Water Quality Standards Handbook (August 19, 1987).

[7] 33 U.S.C. § 1329 (West Supp. 1999).

[8] 33 U.S.C. § 1323 (1986).

specifies that it can be cancelled or modified at any time "to conform with needed changes brought about by law, regulation, Executive order, allotment management plans, land management planning, numbers permitted or seasons of use necessary because of resource conditions, or the lands described otherwise being unavailable for grazing." (*Id.* at 38)

The forage utilization standards contained in the AOP come from the Land Resource Management Plan ("LRMP") for the Malheur National Forest and are designed to allow the recovery of riparian and upland areas. (Grant Co. Excerpt of Record ("Grant Co. ER") at 106, 108; USFS ER at 117) BMPs are incorporated in turn into the LRMP. (USFS ER at 100; Grant Co. ER at 111) Accordingly, the permit required consistency with the LRMP:

> Prior to completion and implementation of the scheduled individual [allotment management plans], we will be working with you through the [AOP] to bring management of the Camp Creek Allotment into consistency with the terms of the [Malheur Forest LRMP]. (Grant Co. ER at 4)

In compliance with § 313, the LRMP contained specific provisions designed to comply with the state's water quality requirements described in Memoranda of Understanding between the Oregon Department of Environmental Quality and the USFS. (*Id.* at 111) Additionally, the LRMP specifically incorporated the provision that grazing activities were to comply with state requirements for protecting the waters of the state through planning, application, and monitoring of BMPs. (*Id.*) Livestock grazing was to be managed so that water quality would

meet Oregon state standards. (*Id.* at 113) All of these requirements are incorporated by reference into the permit at issue. (*Id.* at 4)

Despite employment of all of these measures, Petitioners filed this action alleging that the USFS had violated § 401 by issuing a grazing permit without first obtaining the State of Oregon's certification that the grazing would not violate the state's water quality standards.[9] Respondents Robert Burril, Grant County, and EOPLC intervened as defendants. The district court granted the summary judgment motions of Petitioners, and the Ninth Circuit reversed, holding that the certification requirement of § 401 was meant to apply only to point source releases.[10]

REASONS FOR DENYING THE WRIT

Notwithstanding Petitioners' rhetoric about the serious threat of nonpoint source pollution, the decision below does not merit this Court's review. That decision does not leave the states without recourse for regulating nonpoint source pollution, as Petitioners suggest. (Pet. 6-7) Rather, it affirms more than a quarter century of practice by the states and the affected federal agencies – undisturbed by Congress and the courts – in carrying out their duties to regulate nonpoint source pollution not by means of the certification procedure of § 401 but under other sections of the CWA. Moreover, the decision below

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[9] 172 F.3d 1092, 1094 (9th Cir. 1998) (Pet. App. 4).

[10] *Id.* at 1093-94 (Pet. App. 3-4).

soundly resolves the issue presented in a manner consistent with the legislative history and structure of the CWA. Finally, that decision presents no conflict with this Court's opinion in *PUD No. 1*.

A. The decision below does not merit this Court's review.

The dire picture presented by Petitioners entirely omits reference to the alternative measures employed by the affected federal and state agencies for regulating nonpoint source pollution. The Ninth Circuit's decision is consistent with the longstanding practice of those agencies, and overturning it would upset settled expectations under circumstances where Congress has not seen fit, and the courts have not even had occasion, to disturb those expectations. The decision below also adequately addresses all of Petitioners' concerns and soundly resolves the issue presented. Accordingly, that decision does not merit this Court's review.

1. The Ninth Circuit's decision reflects the long-settled practice of the affected federal and state agencies.

For more than 25 years, the state and federal agencies charged with enforcing the CWA have applied § 401 in the manner approved by the Ninth Circuit below – that is, they have not subjected nonpoint source activity to the certification procedure under § 401 but instead have

employed the means for regulating nonpoint source pollution embodied in other sections of the CWA.[11] During all that time, Congress has not interfered with the prevailing application of § 401 to point source activity, even in the course of adopting amendments in 1987 specifically designed to improve regulation of nonpoint sources. The 1987 amendments, which included the addition of § 319,[12] are described in the legislative history as "an important *first step* in establishing a national nonpoint source program."[13] Section 319 was established "to require development of implementation programs to control nonpoint source pollution."[14] As one senator serving on the Committee on Environment and Public Works, commented:

> For the first time we are authorizing a new nonpoint source pollution control program which is meant to reduce water degradation caused by different types of agricultural runoff and soil erosion. . . . We purposely avoided

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[11] Although Petitioners are correct that dams have been treated as subject to § 401 certification (Pet. 10-11), it is not clear that dams are regulated as nonpoint sources rather than as point sources of nonpollutants. *See, e.g., PUD No. 1*, 511 U.S. at 711; *National Wildlife Fed'n v. Gorsuch* ("*NWF*"), 693 F.2d 156, 165 (D.C. Cir. 1982); *see also* discussion below at page 11. In any event, Petitioners do not contend, nor could they, that state and federal agencies have treated all nonpoint source activity as subject to § 401 certification.

[12] *See* above at pages 3.

[13] S. Rep. No. 99-50, at 8 (1985) (emphasis added).

[14] *Id.* at 33; *see also* H. Rep. No. 99-189, at 8 (1985).

implementing a mandatory regulatory program for nonpoint pollution.[15]

Despite this heightened attention to nonpoint source pollution in enacting the 1987 amendments, Congress did not indicate any need for revising agency practice to assure that the certification procedure under § 401 was employed to control nonpoint sources – indeed, it appears that Congress assumed such certification was *not* happening. In any event, Congress has not seen fit to disturb existing agency application of § 401, either in 1987 or in any other year since the enactment of § 401 in 1972.

Likewise, the application of § 401 to nonpoint sources has received virtually no attention in the federal courts since its enactment. The decision below is the only circuit court decision to address the issue, and apart from the underlying district court opinion, only one other district court has addressed the question, issuing an unpublished ruling consistent with the Ninth Circuit's opinion in this matter.[16]

Reversal of the Ninth Circuit's decision would upset long-settled expectations – with no indication that such sweeping change is necessary or even advisable. Indeed, Petitioners appear to be proposing a solution in search of

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[15] 133 Cong. Rec. S1003 (daily ed. January 21, 1987) (statement of Sen. Simpson).

[16] *Idaho Conservation League v. Caswell*, No. CV 95-394-S-MHW, slip op. at 16-18 (D. Idaho August 12, 1996) (EOPLC Excerpt of Record at 207, 222-24) (holding that nonpoint source activity connected with construction of logging road is not subject to certification requirement under § 401).

a problem, given the nearly total lack of attention by Congress and the courts to the application of § 401 to nonpoint sources. Accordingly, the petition below does not merit this Court's review.

2. The Ninth Circuit's decision soundly resolves the issue presented.

The decision below likewise does not merit this Court's review because it interprets § 401 in a manner that is consistent with its legislative history and structure. Each of Petitioners' criticisms of that sound decision are easily resolved by reference to the decision itself.

First, contrary to Petitioners' contention (Pet. 8-9), it does not necessarily follow from the use of the word "includes" in the statutory definition of "discharge" that Congress intended "discharge" within the meaning of § 401 "to include, but not be limited to, point source activities." Section 401 applies to activities that "may result in any discharge."[17] According to Section 502(16), "The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants."[18] In turn, "[d]ischarge of a pollutant" and "discharge of pollutants" are defined as "any addition of any pollutant to navigable waters from any point source."[19] The plain language of these definitions clearly allows for the Ninth Circuit's interpretation that "discharge," as used without qualification in § 401, includes

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[17] 33 U.S.C. § 1341(a)(1).

[18] 33 U.S.C. § 1362(16).

[19] 33 U.S.C. § 1362(12)(A).

discharges of pollutants *and discharges of nonpollutants.* Indeed, even one of the authorities Petitioners cite as support for their claim that it necessarily follows that "discharge" includes more than point source activities, *Power Authority v. Williams,* applied the same interpretation the Ninth Circuit did.[20]

Second, Congress's concern with nonpoint source pollution is overstated by Petitioners (Pet. 9) and in any event does not inevitably lead to the conclusion that nonpoint sources are included in the definition of "discharge" in § 401. Petitioners' contention (*id.*) that § 401 was "originally intended to address" nonpoint sources of pollution finds no support in the history of that section. Apparently Petitioners intend this argument to be a reference to their interpretation of § ~~21~~(b) of the Water Quality Improvement Act (*id.* at 4),[21] the precursor to § 401 that was enacted in 1970. However, as even Petitioners' admit (*id.*), neither the 1970 Act nor § 21(b) made any distinction between point and nonpoint sources of pollution. It hardly follows that § 401 was enacted with the intention of addressing nonpoint sources of pollution. In any event, whatever the level of Congress's concern with nonpoint source pollution, it does not necessarily follow that that concern, already addressed in other sections of the CWA,[22] was also addressed in § 401.

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[20] 101 A.2d 659, 660, 475 N.Y.S.2d 901, 904 (N.Y. App. Div.), *appeal denied,* 63 N.Y.2d 605 (N.Y. 1984) (cited at Pet. 8-9) (interpreting "discharge" in § 401 as applying to nonpolluting discharges, which may cause pollution).

[21] Pub L. No. 91-224, § 21(b), 84 Stat. 91 (1970).

[22] *See* above at pages 2-3.

Third, contrary to Petitioners' contention (Pet. 10-11), the D.C. Circuit in *NWF* did exactly what the Ninth Circuit's opinion in this matter says it did:[23] like the Ninth Circuit, the D.C. Circuit treated some discharges that may cause pollution as discharges of *nonpollutants*, thereby endorsing the concept that a point source like a dam could "discharge" within the meaning of the CWA both pollutants and nonpollutants.[24] As the D.C. Circuit held,[25] discharges of nonpollutants are not regulated through the § 402 permit program, which applies only to discharges of pollutants[26] – but as the Ninth Circuit reasoned in this matter, discharges of nonpollutants *are* regulated under the broader coverage of § 401. In any event, contrary to Petitioners' contention (Pet. 10), *NWF*, while helpful, is not the sole or even the principal basis for the Ninth Circuit's decision.

Fourth, contrary to Petitioners' contention (Pet. 11), the language of § 401 in fact *could* have been written more broadly. As the Ninth Circuit explained,[27] had Congress intended to require certification for nonpoint source activities, it easily could have written § 401 to mirror the language of § 313, which directs federal agencies "engaged in *any activity* resulting, or which may result, in the discharge *or runoff* of pollutants" to comply with applicable water quality standards.[28]

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[23] 172 F.3d at 1098 (Pet. App. 15).

[24] 693 F.2d at 165.

[25] *Id.*

[26] *See* 33 U.S.C. § 1342 (1986 & West Supp. 1999).

[27] 172 F.3d at 1098 (Pet. App. 14).

[28] 33 U.S.C. § 1323(a) (emphasis added).

Fifth, Petitioners' analysis of the legislative history of § 401 (Pet. 13-15) does not call the Ninth Circuit's analysis into question. As the panel explained,[29] the relevant difference between § 21(b), which made no distinction between point sources and nonpoint sources, and its revision in 1972 to become § 401 is the shift in emphasis to regulation of point sources. Although Petitioners attempt to gloss over this distinction (Pet. 15-16), the change from requiring certification that a discharge "will not violate applicable water quality standards"[30] to requiring certification that a discharge will not violate a list of enumerated sections, *all* of which apply to point sources and only *one* of which applies to water quality standards affecting nonpoint sources – without mention of other sections that apply to nonpoint sources – reflects a deliberate shift in the intended use of the certification procedure, as the Ninth Circuit recognized.[31] That shift is addressed explicitly in the Senate Report for § 401:

> [Section 401] is substantially section 21(b) of existing law . . . amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants.[32]

Contrary to Petitioners' contention (Pet. 17), the language of § 401 was not "broadened" to include the newly

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[29] 172 F.3d at 1096 (Pet. App. 9-10).

[30] Pub. L. No. 91-224, § 21(b)(4), 84 Stat. 91, 108 (1970).

[31] 172 F.3d at 1097 (Pet. App. 12-13).

[32] S. Rep. No. 92-414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 3764 (emphasis added).

adopted National Pollutant Discharge Elimination System program. Rather, the broad, undifferentiated reference to "water quality standards" in § 21(b) was narrowed to refer only to sections that address point sources. Moreover, contrary to Petitioners' assertion (Pet. 17-18), the Ninth Circuit's analysis is consistent with this Court's statement in *Arkansas v. Oklahoma*[33] that compliance with water quality standards is required under § 401; the Ninth Circuit likewise recognized that for activities to which § 401 applies, certification of compliance with water quality standards is still required.[34]

Sixth, the inclusion of 33 U.S.C. § 1313 among the enumerated sections in § 401 does not nullify the latter section's focus on point sources, as Petitioners claim (Pet. 18-20). As the Ninth Circuit explained,[35] all of the enumerated provisions in § 401 apply to point sources; none save one apply to nonpoint sources, and several provisions relating to nonpoint source pollution are not included in § 401. Following Petitioners' logic, Congress would have had to dispense with requiring certification of point source compliance with water quality standards so as not to sweep all nonpoint sources into the certification procedure, simply because water quality standards apply to both.[36] Yet, as Petitioners insist (Pet. 20) and the

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[33] 503 U.S. 91, 103 (1992).

[34] *See* 172 F.3d at 1097 (Pet. App. 12) (noting that reference in § 401 to water quality standards required in 33 U.S.C. § 1313 provides supplementary basis for regulating point sources).

[35] *Id.* at 1097 (Pet. App. 12-13).

[36] That is precisely the analogy to *Oregon Natural Resources Council v. United States Forest Serv.*, 834 F.2d 842 (9th Cir. 1987),

Ninth Circuit acknowledged,[37] water quality standards remain separately enforceable after the 1972 amendments. Petitioners' conclusion that as a result, Congress intended to apply § 401 to nonpoint sources (Pet. 20) simply does not follow, nor does the Ninth Circuit's opinion imply that water quality standards were established "solely" to regulate point source pollution, as Petitioners' contend (Pet. 19). In other words, the fact that water quality standards still apply does not answer whether *certification* of compliance with those standards is required under § 401. As the Ninth Circuit correctly concluded, certification of compliance is required only for point sources, and compliance for nonpoint sources is dealt with in other sections of the CWA.[38]

Finally, contrary to Petitioners' contentions (Pet. 21-22), there is no reason to conclude that § 401 is the

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reflected in the Ninth Circuit's opinion. 172 F.3d at 1097 (Pet. App. 13). There plaintiffs argued that because one section referenced in § 301, 33 U.S.C. § 1311, relates to water quality standards, § 301 in its entirety applies to nonpoint sources. Likewise here, Petitioners have argued that because one section referenced in § 401 relates to water quality standards, § 401 in its entirety applies to nonpoint sources.

[37] 172 F.3d at 1097 (Pet. App. 12).

[38] Contrary to Petitioners' assertion (Pet. 21), the Ninth Circuit did not reason that "because" nonpoint source pollution is not directly regulated by the federal government through the CWA, it is not included in § 401. Rather, the Ninth Circuit explained that although nonpoint source pollution is not regulated directly, the CWA uses the "threat and promise" of federal grants to the states to accomplish this task. *Id.* at 1096-97 (Pet. App. 10-11).

states' "primary mechanism" for regulating federally permitted activities or that the Ninth Circuit's interpretation of § 401 strips the states of authority to address nonpoint source pollution generated by federally permitted activities. Indeed, § 313,[39] requires federal agencies to comply with all state water pollution requirements – and it is absurd to suggest that the states have failed to use their primary mechanism for regulating federally permitted activities for more than a quarter century. Rather, the settled practice of the affected state and federal agencies has been to regulate such activities under other sections of the CWA that authorize them to do so.

B. The decision below does not conflict with this Court's decision in *PUD No. 1*.

Petitioners' contention that the Ninth Circuit's decision conflicts with this Court's decision in *PUD No. 1* (Pet. 22-23) appears to be tossed in almost as an afterthought – and in any event, that contention lacks merit. The issue for resolution in *PUD No. 1* was whether § 401 authorizes states to condition certification on compliance with water quality standards in the context of discharges from point sources. As the Ninth Circuit recognized,[40] this Court held that § 401 did so authorize the states "once the threshold condition, the condition of a discharge, is satisfied."[41] This Court began its analysis of the CWA by observing that the focus of the CWA is upon

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[39] 33 U.S.C. § 1323.

[40] 172 F.3d at 1097-98 (Pet. App. 13).

[41] 511 U.S. at 712, *quoted in* 172 F.3d at 1097-98.

"individual *discharges* into the country's navigable waters *from point sources,*" without elaborating on the definition of a "discharge" under § 401.[42] Petitioners' argument boils down to a suggestion (Pet. 22-23) that the fact that this Court did *not* hold in *PUD No. 1* that a "discharge" triggering § 401 certification must emanate from a point source means that the Ninth Circuit's holding to that effect somehow *conflicts* with this Court's opinion. That suggestion, of course, lacks any basis in fact or logic – particularly given that the parties in *PUD No. 1* conceded that the construction of the dam at issue would involve two types of *point source* discharges.[43] No conflict exists between *PUD No. 1* and the decision below.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted this 23rd day of August, 1999.

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[42] 511 U.S. at 711 (emphasis added).

[43] *Id., cited in* 172 F.3d at 1098.